**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 878 OF 2005**

Shri Namdeo Maruti Mukadam ... Appellant

V/s

Shri Valkya Shankar Mukadam & ors. ... Respondents

Mr. A. A. Garge for the appellant.

**CORAM: P.V. KAKADE, J.**

**DATED: 25TH AUGUST, 2005**

**P.C.:**

1. The appellant has preferred this appeal agasinst the judgment and order passed by the Addl. District Judge, Kalyan, dated 28.9.2004 dismissing the appeal and confirming the judgment and order passed by the Civil Judge, Jr.Divn., Kalyan, dated 25.2.2002 partly allowing the suit in the sense that though the specific performance of the contract between the parties was refused, decree for return of earnest money came to be passed.

2. I have heard the learned counsel for the appellant. Perused the record.

3. The plaintiff filed the suit for specific performance of the contract between the parties which was executed on 30.1.1966 between the plaintiff's father and defendants' father in respect of the suit property agreeing to sell the suit property for an amount of Rs.2500/-, out of which Rs.2200/- were paid and Rs.300/- were to be paid at the execution of the sale deed. The condition for the agreement was to the effect that the defendants should get permission under Sec.43 of the Bombay Tenancy & Agricultural Lands Act (in short, B.T. & A.L. Act) to transfer the property in favour of the plaintiff.

Defendants contested the suit on various grounds inter-alia submitting that though the agreement was executed between the parties, the plaintiff was not entitled for specific performance for the grounds noted including the bar of limitation and, as such, the suit was sought to be dismissed.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that though the execution of the suit agreement dated 30.1.1966 was proved, it was not proved that the plaintiff was ready

and willing to perform his part of the contract.

5. The appeal was carried to the Court of Addl. District Judge, Kalyan. The learned lower appellate Court Judge, after hearing both parties and on the basis of available evidence, concurred with the findings recorded by the lower Court and dismissed the appeal. Hence the present appeal.

6. At the outset, it may be noted that there is absolutely no substantial question of involved in this appeal. The learned counsel for the appellant vehemently urged that major part of the consideration was paid by him and only an amount of Rs.300/- was required to be paid. Moreover, it was for the defendants to comply with the conditions of the agreement to the effect that he was to obtain permission under Sec.43 of the B.T. & A.L. Act and, as such, it was not fault of the plaintiff in this regard and, therefore, concurrent findings recorded by both the Courts below to the effect that the plaintiff was not ready and willing to perform his part of the contract, are erroneous.

In this regard, it must be noted that discretionary

relief of specific performance is essentially both the Courts below appears to have appreciated in proper perspective while using the discretion against the plaintiff. This is especially in view of the fact that the agreement dated 30.1.1966 is not at all pursued by the plaintiff till the year 1996 when he first issued notice to the defendants calling upon them to perform their part of the contract to seek permission under Sec. 43 of the B.T. & A.L. Act. There is absolutely no evidence on record to show that the plaintiff took any action whatsoever during the period of 30 years to obtain execution of the sale deed pursuant to the agreement executed between the parties. This delay of 30 years has remained un-explained and, therefore, both the Courts below have come to the conclusion that the plaintiff is not entitled to the discretionary relief of specific performance of agreement of 1966. In a case wherefrom a given set of circumstances two inferences are possible, one drawn by the lower appellate Court, which is last Court of fact, is binding on the High Court in second appeal. Adopting any other approach is not permissible and High Court cannot substitute its opinion for the opinion of the first appellate Court. It is not within the domain of the High Court to investigate the ground on which the findings were

arrived at by the last Court of fact, being the first appellate Court. This is especially so when there are concurrent findings recorded by both the Courts below on the basis of available evidence and appreciation of which is found to be reasonable and acceptable. In view of this aspect, I do not intend to interfere with the matter and, as such, the appeal deserves to be dismissed.

In the result, the appeal stands dismissed with no order as to costs.

Consequently, Civil Application No. 1408 of 2005 also stands dismissed with no order as to costs.

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